LIM CHEE HOLDINGS SDN BHD

v.

RHB BANK BHD

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: A-02-216-2002]
15 AUGUST 2005

BANKING: *Banks and banking business - Loan facility - Claim for amount outstanding under banking facility - Whether facility may be recalled where borrower fails to comply with scheduled period of repayment*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Whether appellate court should be slow in interfering with findings of fact by trial court - Circumstances where appellate court would be more ready to interfere with trial judge's findings of fact*

EVIDENCE: *Credibility - Assessment of - Whether judgment may be set aside on ground that subsequent judge who took over hearing did not have benefit of hearing and seeing witnesses who testified before earlier judge - Whether new judge entitled to make adverse findings based on notes of evidence taken down by former judge*

TORT: *Negligence - Duty of care - Whether burden on claimant to lead evidence to establish duty of care*

Around 1985 the appellant undertook a housing project in Langkap, Perak (the project). To facilitate the construction and completion of the project the appellant secured from the respondent a bridging loan in the form of overdraft facilities in the sum of RM1 million ('the 1985 bridging loan') and end-financing facilities to the value of RM2 million ('the end-finance facilities'). The terms of these facilities were stipulated in the letter of offer dated 23 April 1985. The appellant failed to meet the repayment target for the 1985 bridging loan. Despite the default the respondent did not proceed with foreclosure action but reviewed the banking facilities. The financial position of the appellant remained poor and later the project was abandoned. The respondent suspended the account of the appellant. By a letter dated 14 May 1991 from the Tabung Projek Perumahan Terbengkalai ('TPPT') the appellant was informed that TPPT was prepared to arrange for the respondent to grant financial assistance

to the appellant in the form of a soft loan facility in the sum of RM1.2 million ('the soft loan') for the sole purpose of reviving and completing the project. Overall the project was not a complete success.

In the first action the main complaint of the appellant was that the respondent had breached the terms of the 1985 bridging loan and thus sought several reliefs. However the High Court dismissed the action. The second action was premised on breach of contract and negligence related to the TPPT agreement. The learned judge was not convinced with the allegations therein and thus dismissed it. The counterclaims of the respondent were allowed. The learned judge who delivered the decision had only heard witnesses called by the respondent since it was a continuation of hearing from another judge, and the earlier judge had heard the appellant's witnesses. The appellant appealed namely on the following grounds: (a) that the learned judge erred in fact and in law in not finding that the respondent had breached the terms of the agreements with the appellant as per the allegations made, in particular the suspension of the account of the appellant; (b) that the learned judge erred in not finding the respondent in breach of the agreement related to TPPT and negligent towards the appellant; (c) that the learned judge failed to give due weight to the relevant evidence adduced before coming to his decision; and (d) that the learned judge made several findings of fact and erred in law in so doing.

Held (dismissing the appeal with costs)
Per Richard Malanjum JCA:

[1] Although the subsequent judge who delivered the judgment did not have the benefit of hearing and seeing the witnesses called by the appellant and yet made adverse findings against the appellant, such disadvantage should not *ipso facto* be a reason to set aside the judgment. The learned judge did not comment on the demeanour of any of the witnesses called by the appellant. At most what he did was to pass a remark that certain facts and documents were omitted by the appellant when presenting its case. As to whether he was correct or not could easily be ascertained, from the notes of evidence taken down by the former judge. It was not a question of assessing the credibility of any of the witnesses called by the appellant. (p 319 e-f)

[2] The general rule is that an appellate court should be slow in interfering with the findings of fact of a trial court. It is only when such finding is clearly erroneous in that it cannot be sustained and supported by the evidence adduced that an appellate court may find it necessary to intervene and substitute its own finding. But even in such a situation a distinction has to be made between a finding of a specific fact which depended upon the credibility of witnesses and a finding of fact which depended upon inferences drawn from other facts. In the latter case, an appellate court would be more ready to interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former since it would be in an equally good position as the trial judge to make the determination. (p 320 c-e)

[3] Having carefully examined the findings of the learned judge, it could not be said that he was clearly wrong in his inferences based on the evidence before him. In coming up with his findings the learned judge only had to consider the allegations of the appellant *vis-à-vis* the contemporaneous documents produced and the explanations given by the respondent. There was therefore no question of the learned judge relying on the credibility or the demeanour of the witnesses called when he made his findings. (p 320 f-g)

[4] Overall there was no reason to interfere with the findings and conclusions of the learned judge on the allegations advanced in the first action. (p 324 e)

[5] The allegation that the respondent had committed several breaches of the agreement executed between the parties pursuant to the TPPT arrangement was unfounded. As to the allegation of negligence, there was hardly any evidence led by the appellant to establish that the respondent owed a duty of care towards it. (pp 324 f, 325 b & 326 g)

[6] It was found by the learned judge that the appellant failed to comply with the scheduled period of repayment. There was therefore no issue of a premature recall of the loan. In fact it was not in dispute that the respondent did not proceed with foreclosure action although there was already a default on the part of the appellant. (p 327 c)

a *[**Bahasa Malaysia** Translation Of Headnotes*

Pada sekitar 1985 perayu telah menjalankan satu projek perumahan di Langkap, Perak ('projek tersebut'). Untuk membolehkan pembinaan dan penyiapan projek tersebut perayu telah mendapatkan daripada responden satu pinjaman kewangan bersepadu dalam bentuk kemudahan overdraf sejumlah RM1 juta ('pinjaman *b* kewangan bersepadu 1985 tersebut') dan kemudahan pembiayaan akhir sejumlah RM2 juta ('kemudahan pembiayaan akhir tersebut'). Terma-terma kemudahan-kemudahan ini telah dinyatakan di dalam surat tawaran bertarikh 23 April 1985. Perayu telah gagal membayar balik dalam tempoh yang ditetapkan bagi pinjaman kewangan bersepadu 1985 tersebut. Namun, responden tidak *c* memulakan tindakan untuk perintah jualan tetapi telah mengkaji semula kemudahan perbankan tersebut. Kedudukan kewangan perayu masih lemah dan tidak berapa lama kemudian projek tersebut terbengkalai. Responden telah menggantung akaun perayu. Melalui surat bertarikh 14 Mei 1991 daripada Tabung Projek Perumahan Terbengkalai ('TPPT') perayu telah dimaklumkan *d* bahawa TPPT bersetuju mengaturkan untuk responden memberikan bantuan kewangan kepada perayu dalam bentuk Kemudahan Pinjaman Lembut sejumlah RM1.2 juta ('Pinjaman Lembut tersebut') untuk tujuan utama menghidupkan semula dan menyiapkan projek tersebut. Secara keseluruhannya, projek tersebut tidak berjaya.

e Dalam tindakan pertama, aduan utama perayu ialah bahawa responden telah memungkiri terma-terma pinjaman kewangan bersepadu 1985 tersebut dan oleh itu telah menuntut beberapa relif. Walau bagaimanapun, Mahkamah Tinggi telah menolak tindakan itu secara keseluruhannya. Tindakan kedua pula telah berasaskan kemungkiran kontrak dan kecuaian berhubung dengan Perjanjian *f* TPPT. Tetapi hakim yang bijaksana tidak berpuas hati dengan alegasi-alegasi yang dikemukakan dan telah menolak tindakan tersebut. Tuntutan-balas responden telah dibenarkan. Hakim yang bijaksana yang telah memberikan keputusan hanya mendengar saksi-saksi yang dipanggil oleh pihak responden oleh kerana perbicaraan tersebut disambung daripada hakim yang lain, dan *g* hakim yang terdahulu itu telah mendengar saksi-saksi perayu. Perayu telah merayu terutamanya atas alasan-alasan berikut: (a) bahawa hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang dalam tidak memutuskan bahawa responden telah memungkiri terma-terma perjanjian-perjanjian dengan perayu seperti yang dikatakan itu, terutamanya dalam *h* penggantungan akaun perayu; (b) bahawa hakim yang bijaksana khilaf dalam tidak memutuskan bahawa responden telah memungkiri perjanjian yang berkenaan dengan TPPT dan telah cuai terhadap perayu; (c) bahawa hakim yang bijaksana telah gagal memberikan pertimbangan yang sewajarnya kepada keterangan-keterangan yang relevan yang telah dikemukakan sebelum

i

keputusannya dibuat; dan (d) bahawa hakim yang bijaksana telah membuat beberapa penemuan fakta dan telah khilaf di sisi undang-undang dalam berbuat demikian.

Diputuskan (menolak rayuan dengan kos)
Oleh Richard Malanjum HMR:

[1] Walaupun hakim yang terkemudian yang memberikan keputusan tidak mendapat manfaat mendengar dan melihat saksi-saksi yang dipanggil oleh pihak perayu dan namun begitu telah membuat penemuan yang bertentangan terhadap perayu, keadaan sebegitu tidak harus *ipso facto* menjadi satu sebab untuk mengenepikan penghakiman. Hakim yang bijaksana tidak menyatakan pendapatnya mengenai tingkah laku mana-mana saksi yang dipanggil oleh pihak perayu. Beliau hanya menyatakan yang perayu telah meninggalkan beberapa fakta dan dokumen semasa membentangkan kesnya. Samada beliau betul atau tidak boleh dipastikan dengan mudah, daripada nota-nota keterangan yang dirakamkan oleh hakim yang terdahulu. Ianya bukan soal menilaikan kebolehpercayaan mana-mana saksi yang dipanggil oleh pihak perayu.

[2] Peraturan amnya ialah sesuatu mahkamah rayuan itu sepatutnya lambat dalam mengganggu penemuan fakta oleh mahkamah perbicaraan. Hanya sekiranya penemuan tersebut adalah dengan jelas silap dan tidak boleh dipertahankan dan disokong oleh keterangan yang dikemukakan, barulah mahkamah rayuan itu perlu mencelah dan menggantikan dengan penemuannya sendiri. Namun, dalam keadaan ini juga perlu dibezakan di antara penemuan satu fakta spesifik yang bergantung kepada kebolehpercayaan saksi dan satu penemuan fakta yang bergantung kepada inferens yang dibuat daripada fakta-fakta lain. Dalam keadaan yang terkemudian itu, sesuatu mahkamah rayuan akan lebih bersedia untuk menggangu penemuan fakta oleh hakim perbicaraan dan mendirikan satu pendapat yang bebas daripada keadaan yang terdahulu itu kerana ia akan berada dalam satu posisi yang sama taraf dengan hakim perbicaraan untuk membuat keputusan tersebut.

[3] Setelah dengan cermat mengkaji penemuan-penemuan hakim yang bijaksana, tidak boleh dikatakan yang beliau dengan jelasnya salah dalam inferensnya berdasarkan keterangan-keterangan dihadapannya. Dalam membuat penemuannya hakim yang bijaksana hanya perlu mempertimbangakan alegasi-alegasi perayu bersama-sama dengan dokumen-dokumen sezaman yang dikemukakan dan penjelasan-penjelasan yang diberikan oleh responden. Oleh itu, tiada isu bahawa hakim yang bijaksana bergantung kepada kebolehpercayaan dan tingkah laku saksi-saksi yang dipanggil apabila beliau membuat penemuan-penemuannya.

[4] Secara keseluruhannya, tiada sebab untuk mengganggu penemuan-penemuan dan kesimpulan-kesimpulan hakim yang bijaksana atas alegasi-alegasi yang telah dikemukakan dalam tindakan pertama.

[5] Alegasi bahawa responden telah melakukan beberapa kemungkiran perjanjian yang ditandatangani di antara pihak-pihak lanjutan daripada rancangan TPPT adalah tidak berasas. Berkenaan dengan alegasi kecuaian, tiada keteragan yang secukupnya dikemukakan oleh perayu untuk membuktikan yang responden mempunyai kewajipan berjaga-jaga terhadapnya.

[6] Hakim yang bijaksana telah membuat kesimpulan bahawa perayu telah gagal mematuhi jadual tempoh bayaran balik. Oleh itu, tiada isu mengenai panggilan balik pinjaman secara pra-masa. Adalah tidak dipertikaikan bahawa responden tidak meneruskan dengan tindakan untuk perintah penjualan walaupun telah terdapat satu kemungkiran oleh pihak perayu.

Case(s) referred to:

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 CLJ 495 SC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd And Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 18(2)

For the appellant - Ambiga Sreenevasan (Mary Lim & Jacinta Johnson with him); M/s KL Choy & Co

For the respondent - Leong Wai Hong (Claudia Cheah & Sharon Tan with him); M/s Skrine & Co

[Appeal from High Court, Ipoh; Civil Suit Nos: 22-188-1994 & 22-59-1996]

Reported by Amutha Suppayah

JUDGMENT

Richard Malanjum JCA:

Introduction

Before us is an appeal by the appellant against the decision of the High Court Ipoh dismissing the appellant's claims in two separate but consolidated actions, namely Civil Suit No. 22-188-1994 (the first action) and Civil Suit No. 22-59-1996 (the second action) and allowing the counter-claims by the respondent under the respective actions.

At the commencement of the hearing of this appeal learned counsel for the appellant informed this court that the appellant had been wound up. However it had obtained a sanction from the relevant authority to proceed with this appeal.

On completion of the hearing we reserved our judgment to enable us to consider the points submitted in the course of the arguments. Having done so this is therefore the judgment of the court.

Narration Of Events

The two actions arose from a series of events that occurred between the appellant and the respondent. Theirs was a customer and banker relationship.

In or around 1985 the appellant undertook a housing project in a small town called Langkap in the State of Perak. The project was called Taman Mewar (the project). The whole project was supposed to consist of 186 units of building with 127 units of single-storey terrace houses, 52 units of double-storey terrace houses and 7 units of double-storey shophouses.

To facilitate the construction and completion of the project the appellant secured from the respondent a bridging loan in the form of an overdraft facilities in the sum of RM1 million (the 1985 bridging loan) and end-financing facilities to the value of RM2 million (the end-finance facilities). The terms of these facilities were stipulated in the letter of offer dated 23 April 1985 from the respondent and which were duly accepted by the appellant.

The security for the 1985 bridging loan was a first legal charge by the appellant over 189 individual land titles identified as P.T. 2041 to P.T. 2229 in the Mukim of Changkat Jong, Daerah Perak Hilir, Perak covering an area of more or less 11 acres and a Directors' Joint and Several Guarantee for the sum of RM1 million.

As for the end-finance facilities the security stipulated in the said letter of offer was an individual first legal charge on the respective units financed by the respondent under the respondent's approved end-finance Scheme and a Master Guarantee by the appellant until the issuance of Certificate of Fitness.

It was also a term in the said offer letter that the 1985 bridging loan should be repaid by way of redemption of the individual title deeds or within a period of two years from the date of first drawdown whichever was earlier. And the redemption sums were also specified, namely:

a. for the 127 units of single storey terrace houses – RM6,100 per title;

b. for the 52 units of double storey terrace houses – RM6,100 per title; and

c. for the 7 units of double storey shophouses – RM31,000 per title.

As for the end-finance facilities the repayment stipulated was for a maximum period of 20 years for the dwelling houses and 15 years for the shophouses.

The 1985 bridging loan and the end-finance facilities were respectively maintained at the Wisma Central branch and Gopeng branch of the respondent.

The appellant failed to meet the repayment target for the 1985 bridging loan and as at 31 May 1987 the outstanding sum due under the bridging loan was RM777,356.34. As at 31 August 1988 the sum outstanding (principal and accrued interest) stood at RM931,158.88. But on the principal sum alone the amount disbursed from the bridging loan as at 31 August 1988 was RM395,133.04.

Despite the default the respondent was prepared to assist the appellant to complete the project. It did not therefore proceed with foreclosure action but review the banking facilities. In particular the mode of repayment of the 1985 bridging loan was revised. The availability period for the end-finance was also specified for a period of twelve months from approval and was limited to 53 units of residential houses. The revised terms were contained in the letter of the respondent to the appellant dated 10 August 1987. However there were amendments to the terms as contained in three subsequent letters dated 2 November 1987, 23 November 1987 and 25 November 1987.

In the said letter of 10 August 1987 the repayment mode for the 1985 bridging loan was stipulated to be by way of sales proceeds of 53 units of residential houses totaling RM1,546,000. The security however remained the same including the first legal charge except that it was over the remaining 175 title deeds.

New conditions were also suggested namely:

a. that a representative of M/s Hanafiah Raslan & Mohamad (HRM) should be appointed as an Independent Accountant to monitor the work progress and to assist in the management of the affairs of the appellant relating to the project;

b. that HRM as the Independent Accountant would ‘direct and control the payments of cost of construction of RM568,400 and interests of RM977,600’;

c. that all disbursements to agreed parties would be made by the respondent for 36 units of the single storey terrace houses on the agreed basis of:

i. Building contractors – RM396,000;

ii. Professional fees – RM10,800;

iii. Administration – RM140,000;

iv. Infrastructure –RM21,600; and

v. Payment to respondent – RM977,600.

Subsequently in a letter dated 2 November 1987 from the respondent further amendment to the proposed mode of repayment was made. The Project Account System (PAS) as described by DW3 – Mr. Lee Ah Gee was introduced. For convenience the relevant portion of the said letter is reproduced herein and it reads thus:

> We refer to the above and **your request for a new scheme of repayment through the sales of 100 units of single storey terrace houses** as proposed by Hanafiah Raslan & Mohamad.
>
> We are pleased to inform that the Bank has approved the new scheme of repayment of the above-mentioned facilities, subject to the compliance of the Bank's terms and conditions as follows:
>
> a. the appointment of an Independent Accountant to supervise the progress of work done and to ensure that the whole sales proceed to be remitted to the Bank for control and disbursement to all parties. The disbursement of the sale proceed from 100 units under the proposal is detailed as follows:

Sale Proceed	$2,680,000
Less Disbursement:	
Cost of Construction	1,100,000
Administration	180,000
Professional Fees	17,000
Infrastructure	280,000
Cost of LLN, Tangki & Surau	300,000
	$803,000
Add Sales of 17 units of completed double storey terrace houses	595,000
Balance available to Bank	$1,398,000

b. to further release the balance of the undrawn portion of the bridging finance for the construction of the 100 units of single storey terrace houses.

Please note that the other terms and conditions as stated in our letter of offer to you dated 10th August, 1987 remains unchanged.

Kindly acknowledge receipt. (emphasis added).

The terms stated in the said letter of 2 November 1987 were duly accepted by the appellant and in fact it responded in the form of a letter dated 23 November 1987. Shorn of the formalities that letter reads:

Re: Banking Facilities

We thank you for your letter dated 2nd November 1987 and further to our teleconversation with your Mr. Ng Jit Sing on the 18th instant, we wish to advise you that paragraph (b) of your offer letter should read as follows and not as otherwise stated in the above letter:

(b) to further release the balance of the undrawn portion of the bridging finance for the completion of the 32 units of double storey houses.

Kindly do the necessary amendments and let us have your offer letter at your earliest convenience.

A reply then came from the respondent in a letter dated 25 November 1987 to rectify the position. The relevant portion of the letter reads:

Banking Facilities

Kindly be informed that paragraph "b" in our earlier Letter of Offer dated 2-11-1987 should be amended as follows:

To further release the balance of the undrawn portion of the Bridging Finance for the construction of the 32 units of double storey houses.

The other terms and conditions in the said letter remain unchanged.

Kindly signify your acceptance by signing on the duplicate copy and return the same to us.

Despite the introduction of PAS the financial position of the appellant remained poor and it affected the completion of the project. In fact by early 1990 the project was abandoned and in March 1990 the respondent suspended the account of the appellant. Indeed the sums due became the subject of the counterclaim of the respondent under the first action.

By a letter dated 14 May 1991 from the Tabung Projek Perumahan Terbengkalai (TPPT) the appellant was informed that on the basis of the facts and proposal contained in the Peat Marwick Consultants Sdn Bhd's Evaluation Report TPPT was prepared to arrange for the respondent to grant financial assistance to the appellant in the form of Soft Loan Facility in the sum of RM1.2 million (the Soft Loan) for the sole purpose of reviving and completing the project. But it was also stipulated in the said letter that the Soft Loan would be subject to such terms and conditions as the respondent would impose in its letter of offer to the appellant.

Accordingly the respondent issued a letter of offer dated 30 May 1991 to the appellant containing a host of terms and conditions to be either complied with, observed or noted, *inter alia*:

a. it was an overdraft facility in the sum of RM1.2 million;

b. the sole purpose was for the revival and completion of the project;

c. the grant of the facility was dependant upon TPPT having deposited with the respondent an equivalent amount to be advanced to the appellant;

d. the appellant 'shall open and maintain a project account with the respondent and all progress payments from house purchasers and/or end financiers shall be deposited into the project account and no other bank account should be opened or maintained' by the appellant without the written consent of the respondent;

e. the repayment of the facility was on demand basis and in priority to all existing secured and unsecured liabilities of the appellant;

f. the security for the facility was stipulated thus:

   i. 'Fixed and floating debenture charge over all the present and future fixed and non-fixed assets' of the appellant;

   ii. 'Joint and Several Guarantee of all the Directors' of the appellant;

   iii. 'Second legal charge over all the unsold lots (units) of Taman Mawar, Langkap, Perak and ranking in priority over the existing charge created' by the appellant in favour of the respondent;

   iv. The appellant 'shall execute and deliver' a deed of assignment in favour of the respondent pertaining to all its rights, title and interest on all monies payable by the house purchasers and/or their end-financiers of Phase I of Taman Mawar;

g. appointment of Peat Marwick Consultants Sdn Bhd (Peat Marwick) as an Independent Financial Consultant of the appellant and/or as an Independent Project Manager, to monitor and manage the completion of the project, subject to the approval of TPPT and the respondent. 'The appointment is further subject to terms and conditions acceptable' to the respondent and TPPT and 'is to be irrevocable unless otherwise consented' by TPPT and the respondent;

h. 'Advances made under the facility shall be made against quarterly cash flow budgets provided' by the appellant and approved by the Independent Financial Consultant. Any payment to the contractors of the project 'shall be based on duly certified Architect's Certificates verified' by the Independent Financial Consultant and 'all other disbursements must be made against' the appellant's 'cash flow budgets as approved' by the Independent Financial Consultant and 'supported by documentary evidence'. The respondent 'reserves the absolute right to reject any request for disbursements as and when it deems it necessary';

i. on redemption of titles – titles charged to the respondent under the project 'maybe released to the house purchasers and/or their financiers against payment of redemption sum'. The redemption sum shall be fixed as follows:

For constructed units –

Sold Units	:	Redemption sum 'will be based on the unreleased portion due from end-financiers/house purchasers less 5% of the selling price to be held as retention sum'.
Unsold units	:	Redemption sum 'will be based on the selling price less 5% of the selling price to be held as retention sum'.
For un-constructed units	:	The redemption sum 'will be paid from the net cash surplus generated from the completion of the project in accordance with the Evaluation Report of Peat Marwick Consultants Sdn Bhd dated January 1991'.

The respondent 'reserves the right to vary the above redemption sum upon the recommendation' of the Independent Financial Consultant and/or as and when it deems fit;

j. one of the signatories of the project account maintained with the respondent must be a representative from Peat Marwick in its capacity as the Independent Financial Consultant of the appellant;

k. the units comprised in the project 'are only to be sold or dealt with upon consultation with the Independent Financial Consultant and the sale proceeds from the house purchasers or their financiers are to be collected and paid into the project account only.' The appellant or any of the appellant's servant or agent (save and except for the Independent Financial Consultant) 'will not sell or deal howsoever with any of the Units' comprised in the project nor accept any sale proceeds from the purchasers and/or their financiers without the knowledge and/or consent of the Independent Financial Consultant;

l. in the event any part of the sale proceeds 'is paid direct' to the appellant, the appellant 'undertakes to redirect the same' to the respondent for the credit of the project account immediately;

m. neither the appellant nor the Independent Financial Consultant nor any other servant or agent 'will sell any of the presently vacant lots charged to the respondent which do not form part of the project without the expressed prior approval' of the respondent;

n. the appellant 'shall not offer any of its assets existing to hereafter acquired nor provide any undertaking as security for any loan or other indebtedness now or hereafter existing without the written consent' of respondent and TPPT.

And pursuant to the offer for the soft loan, a loan agreement dated 23 October 1992 was thus executed between the appellant and the respondent. Thereafter works resumed on the project.

Then by a letter dated 10 June 1995 TPPT requested for the return of the money deposited with the respondent made in connection with the letter of offer dated 30 May 1991 issued by the respondent to the appellant. At that stage it was the view of Peat Marwick that the objective of TPPT had been achieved with the completion of all the purchased units.

The request was duly complied with and in turn the respondent requested the appellant to settle all outstanding sums in connection with the soft loan. As at 25 March 1996 the sum outstanding was RM104,824.98. This outstanding sum constituted the counter-claim of the respondent under the second action.

Overall the project was not a complete success. The appellant blamed it on the attitude of the respondent, in particular on the disbursement of the 1985 bridging loan. These grievances crystallized in the form of the first and second actions launched against the respondent.

In The High Court

In the first action the main complaint of the appellant was that the respondent had breached the terms of the 1985 bridging loan and thus sought for several reliefs. However the learned High Court Judge dismissed the action in toto.

In the second action it was premised on breach of contract and negligence related to TPPT agreement. But the learned judge was not convinced with the allegations therein and thus dismissed it.

The counterclaims of the respondent were allowed. In relation to the first action the learned judge found that the appellant did not seriously contest the fact that there was an outstanding sum of RM2,285,377.31 which included interest and costs arising from the earlier releases under the 1985 bridging loan and an additional loan made without any consideration. As for the counterclaim in the sum of RM104,824.98 under the second action again the learned judge found that the appellant did not dispute it and was therefore satisfied based on the statements of accounts produced that the respondent was entitled for judgment entered in its favour.

This Appeal

The appellant advanced several grounds in seeking for the reversal of the High Court decision. But having read them in entirety and having heard the submissions of the respective learned counsel for the parties we are of the view that effectively the main complaints against the judgment of the court below may be categorized into four broad issues, namely,

a. that the learned judge erred in fact and in law in not finding that the respondent had breached the terms of the agreements with the appellant as per the allegations made, in particular the suspension of the account of the appellant;

b. that the learned judge erred in not finding the respondent:

   i. in breach of the agreement related to TPPT; and

   ii. negligent towards the appellant;

c. that the learned judge failed to give due weight to the relevant evidence adduced before coming to his decision; and

d. that the learned judge made several findings of fact and erred in law in so doing.

In her opening remark learned counsel for the appellant focused on the fact that the learned judge only heard witnesses called by the respondent since it was a continuation of hearing from another judge, Mr. Justice Kang Hwee Gee. But that *per se* did not trouble her. And rightly so since the law allows a judge to take over a part heard case from another judge. (See: s. 18(2) of the Courts of Judicature Act 1964).

Learned counsel however submitted her concern in that the subsequent judge, Mr. Justice James Foong who delivered the judgment, did not have the benefit of hearing and seeing the witnesses called by the appellant and yet made adverse findings against the appellant. One instance cited was when the learned judge stated in his judgment that the appellant concealed from the court the 1985 agreement between the parties and that it was evasive in answering questions. According to learned counsel these were attributed to the witnesses of the appellant in particular PW1 – Mr. Lim Chee who the learned judge did not hear and see in the witness's box.

There was no dispute that the learned judge did not see and hear the witnesses called by the appellant during the trial. But in our view such disadvantage should not *ipso facto* be a reason to set aside the judgment. The nature of reference to such testimonies in the judgment is crucial. We note that in his judgment the learned judge did not comment on the demeanour of any of the witnesses called by the appellant. At most he did was to pass a remark that certain facts and documents were omitted by the appellant when presenting its case. As to whether he was correct or not could easily be ascertained, even by this court, from the notes of evidence taken down by the former judge. It is not a question of assessing the credibility of any of the witnesses called by the appellant. With respect we therefore find no merit in this aspect of the submission by learned counsel for the appellant.

Anyway having considered the remark by the learned judge as highlighted by learned counsel for the appellant and having perused the notes of evidence we agree that such remark of the learned judge was not entirely correct as PW1 in his testimonies did refer to the 1985 loan facilities. But it is also obvious that in the presentation of documents by the appellant the letter of offer of 23 April 1985 was not given any prominence and was not placed in accordance with the sequence of events. Be that as it may nothing turns on the point since the remark did not form any part in the findings of the learned judge when addressing the allegations and grievances of the appellant.

The next main complaint of the appellant was that the learned judge failed to properly appreciate the relevant evidence and erred in facts and thus in law. It was submitted that if he had done so he would have found that the respondent did breach the terms of the 1985 bridging loan when it failed or delay, *inter alia,* in making payments for the disbursements, contractor's claims and delayed in the award of tenders for works on the roads and drains in the project.

Unfortunately for the appellant these complaints are related to the findings of fact by the learned judge. And the general rule is that an appellate court should be slow in interfering with findings of fact by a trial court. It is only when such finding is clearly erroneous in that it cannot be sustained and supported by the evidence adduced that an appellate court may find it necessary to intervene and substitute its own finding. But even in such situation a distinction has to be made.

In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 3 CLJ 163 it was held that a distinction could be drawn between a finding of a specific fact which depended upon the credibility of witnesses and a finding of fact which depended upon inferences drawn from other facts. In the latter case, an appellate court would be more ready to interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former since it would be in an equally good position as the trial judge to make the determination.

Having carefully examined the findings of the learned judge in this appeal we are unable to say that he was clearly wrong in his inferences based on the evidence before him. In fact in coming up with his findings the learned judge only had to consider the allegations of the appellant *vis-à-vis* the contemporaneous documents produced and the explanations given by the respondent. Basically there was no dispute on these facts, namely, that payments were refused or not made as promptly as the appellant wanted them and that the account of the appellant was suspended. These were attributed to the respondent. However the real issue for the learned judge to determine, given such facts, was whether its acts and omissions were reasonable or justified in the circumstances. There was therefore no question of the learned judge relying on the credibility or the demeanour of the witnesses called when he made his findings.

For instance, in the first action, the learned judge found that the respondent should not be faulted for any delay in the release of the balance of the 1985 bridging loan, for the delay or non-payment of staff salaries and administrative charges, for the delay in the release of end-finance claims and for the delay in making payments to the contractor's claims. The learned judge was of the view that under the PAS arrangement no payment could be effected unless with verification and approval by HRM. The learned judge also found that the alleged delay was due to time being required to make the necessary changes to the accounts signatories. And it was found that no evidence was tendered by the appellant to show that the respondent delayed payments even after the certification by HRM. We find no error in the findings. It should be noted that when the appellant failed to meet the repayment schedule as agreed under the terms of the 1985 bridging loan the situation changed. The appellant should not expect for the continuation of the same terms as against the respondent while it ignored its own obligations.

There was no dispute that under the terms of the 1985 bridging loan the appellant was supposed to repay the loan taken by way of redemption of the individual title deeds or within a period of two years from the date of first drawdown whichever was earlier. However as at 31 May 1987 there was no repayment.

The appellant argued that there was no letter of demand for repayment. With respect we find no such requirement in the letter of offer dated 23 April 1985. And it was also submitted that based on Peat Marwick report the amount to be realized from the sales of the houses should be sufficient to meet the repayment of the bridging loan. But in our view reliance on the report is quite incorrect. The statement in the report was only a projection on the financial position of the appellant and premised on a hypothesis that all the houses could be sold. Indeed even Peat Marwick subsequently did not recommend for the project to be further financed under TPPT after the completion of those purchased units on the ground of poor sales of the other completed but unsold units. It was not in dispute that the project was caught by the economic recession soon after it was lunched.

The appellant also contended that the outstanding sum under the bridging loan had been written off by the respondent in its bank statement issued on 28 May 1998 and that there was no mention of any error in its letter dated 10 March 1999. No doubt the letters seem to support the contention. However on perusal of the notes of evidence as recorded by Mr. Justice James Foong, DW9 – Mr. Alex Tan Aun Aun, did give a lengthy explanation of the error which was committed by an inexperienced officer of the respondent. In any event the appellant appeared to have not taken the issue seriously. In its

defence to the counter-claim such issue of fact was not pleaded. Further, the fact that the learned judge found that the counter-claims were not seriously challenged and thus allowed them should indicate that he accepted the explanation of DW9 on the error. In passing, we note that there was no explanation or apparent reason given for the respondent to simply write-off such a large amount of outstanding sum let alone any request by the appellant. Thus we find the contention has no merit.

Due to the failure by the appellant to make the repayment of the bridging loan on schedule the respondent could have taken the easy way out by just proceeding with foreclosure action. But it did not. It proposed several measures to be taken so as to enable the project to continue. Some of the measures proposed were a revision of the repayment mode, for the appointment of an Independent Accountant in order to monitor the work progress of the project and for sales proceeds of the houses sold to be deposited into a designated bank account under the supervision of the proposed Independent Accountant. The appellant agreed to these measures. However as found by the learned judge the appellant did not fulfill its part of the bargain when it failed to deposit the sales proceeds into the designated bank account. Such failure was justified by the appellant on its need to pay the staff salaries and administrative charges.

It was therefore a situation of where the appellant expected the respondent to religiously observe the terms of the 1985 bridging loan notwithstanding the letter of 10 August 1987 and its acceptance of the proposed measures. It also expected the respondent not to react for its failure to repay the loan according to schedule and for failing to deposit sales proceeds into the agreed designated bank account. The appellant also ignored the fact that the measures proposed as contained in the letter of 10 August 1987 and in the subsequent letters were agreed upon and in response to its request in order to assist it to complete the project. Given such scenario it would have been grossly unfair if the learned judge found otherwise than as he did.

Under the first action the appellant also complained of delay in the award of tender for the construction and completion of the roads and drains in the project. The alleged delay was attributed to HRM which the appellant argued should not have been involved in the tender exercise. And for the alleged delay of six months the appellant contended that the respondent should be answerable for the act of HRM. However the learned judge rejected the allegation after examining the circumstances then prevailing. Indeed such finding is also a finding of fact which at the appellate level we should be slow to interfere. Anyway on perusal we find no error in the reasoning of the learned judge in coming up with his finding. He relied on the testimony of DW4 Mr. Eapan of HRM whom he saw and heard in the witness box when explaining

that the appellant sought advice from HRM on the tender exercise. There was no admissible evidence tendered to the contrary as the appellant did not call one Freddy Choo the then General Manager of the appellant and who was in contact with HRM at that time. Hence in our view the learned judge did not err in rejecting such allegation by the appellant.

As for the allegation that it was outside the scope of HRM to handle the tender exercise we are also in agreement with the conclusion of the learned judge. It is clear from the letter of 10 August 1987 that HRM was to assist the appellant in the management of its affairs. And it was only upon the request by Freddy Choo for advice on the matter that HRM was involved and which in turn sought the assistance of one Mr. Quay. Surely such involvement can easily be described as assisting the appellant.

On the assertion that the respondent should be answerable for the acts of HRM, again it is a question of fact whether HRM was the servant or agent of the respondent. There was no dispute that the appointment of HRM as an Independent Accountant was proposed by the respondent in its letter of 10 August 1987 to the appellant. But that alone should not make HRM the servant or agent of the respondent. More so in this case where the appellant agreed to the proposal. At best therefore HRM was a joint-appointee of the parties to act as their 'professional middleman' to help resolved the problematic project. Hence we have no reason to interfere with the finding of the learned judge on this point.

The other reason attributed by the appellant for its poor performance in the project was on the delay and refusal by the respondent to release the document of titles for redemption. It was the contention of the appellant that the respondent unilaterally varied the redemption sums when it insisted that redemption of titles would only be allowed upon receipt of the full sales proceeds and for those purchasers with loans from the Government redemption would only be allowed upon receipt of the land costs plus an undertaking from the solicitors of the appellant to remit the balance of the loans to the respondent upon receipt of the same from the Government. The appellant maintained that the redemption rates as given under the terms of the 1985 bridging loan should have been followed.

As noted by the learned judge the letter of 10 August 1987 did not mention any revised redemption sum. But it should not mean that the respondent was bound to continue with the previous rates irrespective of the changed circumstances. In fact the letter of 10 August 1987 clearly stated that the arrangement contained therein was to supersede and cancel the letter of offer of 23 April 1985. Thus on that ground alone the appellant had no basis to insist that the previous rates should have been followed.

Further, we have read the reasons given by the learned judge which are basically findings of fact and we find no basis for us to disagree with him. As found by the learned judge and which we agree the situation changed after the appellant failed to meet the repayment schedule. It would only be fair to expect that the respondent would take steps to secure its position including the security for the loan granted.

The appellant also complained that the respondent was wrong in suspending its account. The learned judge did not entertain the grievance as he found that the suspension was justified since the appellant failed to comply with the terms of 10 August 1987 letter of offer, in particular its failure to pay into the designated bank account the sales proceeds. We have no reason to disagree with that conclusion of the learned judge.

It is also the submission of learned counsel for the appellant that the non-payment into the designated bank account the proceeds of sales should not have been held against the appellant since HRM knew that the sales proceeds were used to pay for salaries and administrative disbursements. If indeed the appellant was right in its assertion then HRM as found by the learned judge would not have confirmed that the appellant failed to pay into the designated bank account all the proceeds of sales. HRM would have not also refused approval to the claims for staffs' salaries and administrative charges.

Overall therefore we find no reason to interfere with the findings and conclusions of the learned judge on the allegations advanced in the first action.

In respect of the findings of the learned judge in the second action learned counsel for the appellant submitted that there was insufficient judicial appreciation of evidence resulting in not finding that the respondent had committed several breaches of the agreement executed between the parties pursuant to the TPPT arrangement (the TPPT agreement). The thrust of the complaint of the appellant is that the respondent refused or failed to release monies for the completion of the project. Unfortunately having said that learned counsel failed to elaborate. Instead she proceeded to highlight the instances of alleged breaches of the TPPT agreement by the respondent in the form of:

a. inflating the redemption sum;

b. in delaying the release of the end-finance; and

c. in delaying the process of redemption of titles.

In respect of (a) the learned judge, after examining the evidence before him including the relevant documents, found that the respondent could not be faulted for increasing the redemption sum since the appellant had already breached the terms of the TPPT agreement when it sold the houses below the agreed minimum selling price. The learned judge went on to say that if the redemption sum as stated in the TPPT agreement were to be maintained even after the appellant had reduced the selling price the result would be that there would have been insufficient fund to settle the outstanding loan with the respondent. In other words, it would mean that the respondent would have effectively reduced the value of the security it was holding for the loan granted. We have no reason to interfere with the reasoning.

On the assertion that the respondent had indirectly agreed to the reduction of the selling price by its silence during the meeting on 29 March 1995 and hence there was no breach on the part of the appellant, the learned judge held otherwise. We agree with the finding. If there was any intention to vary any of the terms of the TPPT agreement by the appellant it should have consulted the respondent and not merely assuming based on the silence of the respondent during a meeting which also discussed other matters. In fact the point of reducing the selling price was only a suggestion by Peat Marwick and the Chairman of the meeting. It was not a resolution adopted.

Much effort was also put by learned counsel before us on the point that there was a delay by the respondent to release the end-finance to the appellant. She relied substantially on the Peat Marwick's progress reports. But with respect she failed to note and as pointed by the learned judge that in the amended statement of claim the allegation was on delay in giving the redemption sums. Thus, strictly speaking, the submission had no foundation to stand on. Anyway, the learned judge found as a fact, after considering the explanation given by the witnesses for the respondent, that there was no unreasonable delay on the part of the respondent when making payments for the end-finance. We find no basis to interfere in such finding.

The other complaint by the appellant was that the learned judge erred in finding that there was no evidence of delay in the process of redemption of certain specific titles. Learned counsel highlighted, *inter alia*, a fact that on 26 February 1994 the appellant did complain to Peat Marwick on the delay by the respondent in releasing certain titles although all payments had been made as of 2 February 1994. It was the assertion of learned counsel that those titles were only released months later. Other alleged instances of delay were also submitted. However we note that learned counsel only relied on certain letters upon which an inference of delay was then alleged.

The learned judge gave a general finding by saying that when the entire history of these lots was taken into consideration the allegation of delay was proved unfounded. He did not go into the specifics. Be that as it may, such finding too is a factual finding which as an appellate court we should be slow to disturb.

On closer reading of the pleadings in particular para. 5(2) of the amended statement of claim upon which the allegation was premised, we can appreciate the problem faced by the learned judge. In fact he expressed it when he was dealing with the allegation on delay in the release of end-finance. We therefore agree with the learned judge that the subheading of that paragraph is misleading. And it is therefore not surprising that the learned counsel for the respondent submitted that no evidence had been adduced to support such allegation. Indeed it could be said that the allegation was not before the learned judge to begin with. Hence he was not obliged to make any finding on it.

We also note that even the learned counsel for the appellant mainly relied on documents to substantiate an inference that there was delay. By referring to the testimony of DW3 – Lee Ah Gee as an indication that the respondent gave no explanation was quite incorrect. From the answers given by DW3 on some of the questions posed it is obvious that the information sought for was not within his knowledge. That is not the same as saying that the respondent did not have any explanation.

If there was any delay as alleged, the explanations given by the respondent were several, ranging from the attitude of the purchasers/borrowers in not taking the necessary insurance policies to non-payment of outstanding interest for the advances given to the appellant. There was hardly any dispute on these incidents which could be taken as justification for such delay. There is therefore no merit on this point.

As to the allegation of negligence we are also inclined to agree with the finding of the learned judge that there was hardly any evidence led by the appellant to establish that the respondent owed a duty of care towards it. And before us there was scarcely any submission on the point. Obviously it was a non-starter.

In prosecuting these claims heavy reliance was placed by the appellant on the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 CLJ 495 where it was held, *inter alia*, by the then Supreme Court that the bank was in breach of contract when it treated the term loan as an on demand loan and recalled it prematurely, that is to say, before its right to do so had accrued.

With respect, we are inclined to agree with learned counsel for the respondent that the facts of this case under appeal are entirely different to that of *Mae Perkayuan Sdn Bhd & Ors (supra)*. In the latter there was no dispute that the bank had earlier on given to the borrower, *Mae Perkayuan Sdn Bhd*, a bridging loan in the sum of RM4.5 million in the form of overdraft facilities for a specific period of four years. However when the bank, without notice, decided to recall the loan on 14 October 1985, there was still about eight and a half months to run and the sum due was RM4,322,813.04 which included interest accrued.

In this case under appeal it was in evidence and found by the learned judge that the appellant failed to comply with the scheduled period of repayment. There was therefore no issue of premature recall of the loan. In fact it was not in dispute that the respondent did not proceed with foreclosure action although there was already a default on the part of the appellant. Thus, the case cited has no relevance to the issues at hand.

As regards the appeal against the decision of the learned judge in allowing the counterclaims of the respondent, it is basically premised on the contention that the sum outstanding had been written off by the respondent. We have already addressed this issue hereinabove. Hence the contention has no merit.

There was hardly any dispute that loans were given to the appellant and that they had not been fully repaid. As found by the learned judge which we agree, the counterclaims in the respective actions were hardly disputed. Thus, we find no basis in the submission that the counter-claims have not been proved.

Conclusion

For the foregoing reasons we dismiss this appeal with costs to the respondent to be taxed. We therefore affirm the decision of the High Court. Deposit for this appeal is to be paid to the respondent to account for taxed costs.